THE NATURE OF THE CRIMINALIZATION OF PRIVATE LEGAL SUBJECTS AS PERPETRATORS IN CORRUPTION CRIMES

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ABSTRACT

The purpose of this study is to analyze the nature of punishment for private law subjects as perpetrators of corruption. This research is a normative legal research using a statute approach, analytical and conceptual approach to cases that are relevant to the research object being studied. The data used in this study is secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. The results of this study indicate that the essence of punishment in criminal acts of corruption based on Law Number 31 of 1999 in conjunction with Law Number 20 of 2001 is a cumulative punishment which includes corporal punishment, refund of state financial losses, confiscation of goods originating from corruption. (primary punishment and additional punishment), while the essence of punishment for private law subjects is in addition to corporal punishment and refund of state financial losses as well as administrative sanctions in the form of revocation of permits and certain rights against legal entities (corporations).

Keywords: Criminalization, Private Legal, Perpetrators, Corruption Crimes.

I. INTRODUCTION

The implementation of prosecution and eradication of criminal acts of corruption is not carried out immediately. However, it must be in accordance with the norms or with applicable legal rules, and with respect for the human rights of the corrupt. Even the prosecution and eradication of criminal acts of corruption should be carried out as far as possible while still referring to the principles of good governance (good governance) [1]. The application of the principles of good governance (good governance) in the context of taking action and eradicating corruption, with a hope, namely the creation of legal objectives (justice, benefit, and legal certainty) [1].

In addition, it must also be understood that in essence corruption is a special type of crime, namely a crime whose regulation is outside the Criminal Code (KUH).[1]. The importance of corruption is specifically regulated in a law (das Sollen), based on the principle of legality in order to provide and eradicate corruption. Empirical facts (das Sain) provide clues that this legal phenomenon has become a legal phenomenon, it is suspected that it has become a public disease that is very dangerous for the life of the nation and state. [2].

In line with the development of human progress as well as the mode of development of the criminal act of corruption, it develops with a mode that disguises the actions of the parties or perpetrators with a legal action as if it were a pure civil act or the actions of the perpetrators were in the realm of private law [3] [4].

Then in today's corruption crime occurs with the parties who make an agreement regarding something in the form of an event that gives rise to the rights and obligations of the parties as outlined in a contract by demanding the responsibilities of the parties according to the contents of the contract agreed by the parties [5] [6]. a party which means subject to private law, where the law or the contents of the contract become binding law for the parties entering into a temporary contract if it is seen that the existing Corruption Eradication Act is subject to public law so that the parties become perpetrators, suspects and at the same time eventually became a convict. This is manifested by the active involvement of the state and other parties in the movement to eradicate corruption [7].
The basis for philosophical considerations from the government to eradicate corruption, because corruption has been widespread so far. The crime of corruption is not only detrimental to state finances, but is also a violation of the social and economic rights of the community at large, so that the criminal act of corruption needs to be classified as a crime whose eradication must be extraordinary.

Based on legal facts, it is known that after the promulgation of the Law on the Eradication of Criminal Acts of Corruption, it was found that there were several possibilities that could cause a legal vacuum for law enforcement officers in an effort to eradicate corruption. This legal fact becomes one of the sociological-juridical reasons for the government to then make changes and improvements through Law Number 20 of 2001 concerning Amendments to Law Number 31 of 1999 concerning Eradication of Criminal Acts of Corruption.

Another reason behind the government's thinking is that changes and improvements are made to regulations to eradicate corruption, solely to ensure legal certainty, avoid diversity of legal interpretations and provide legal protection for the social and economic community, as well as fair treatment in eradicating corruption in the community, realizing effectiveness, objective, fair and transparent and accountable in the enforcement of corruption.

Thus, the existence of Law Number 20 of 2001 which has changed and has perfected Law Number 31 of 1999 concerning the Eradication of Criminal Acts of Corruption has in fact expanded the meaning of the criminal act of corruption and at the same time strengthened the roles and functions of each institution and law enforcement officers. law in an effort to eradicate all forms and types of corruption in Indonesia.

With regard to changes and improvements to regulations to eradicate corruption, it is hoped that various modes of operation of irregularities in the state's finances and economy, social and economic rights of the community can be reached. So it is not surprising if there are members of the public who consider that the existence of Law Number 31 of 1999 is a tiger trail that will capture and eradicate corruption from its roots.

How important it is to eradicate various types and forms of criminal acts of corruption, because the modus operandi of criminal acts of corruption is increasingly sophisticated and complicated so that the formulation of criminal acts of corruption has reached acts of enriching oneself or another person or a corporation against the law, both in a formal sense. both material and material, it includes all forms and types of disgraceful acts, so that according to the sense of justice the perpetrators (corruptors) must be prosecuted and punished.

Methods
This research is a normative legal research using a statute approach, analytical and conceptual approach to cases that are relevant to the research object being studied. The data used in this study is secondary data consisting of primary legal materials, secondary legal materials and tertiary legal materials. The theory used in this study is the Theory of Legal Authority, Theory of Legal Functions, Theory of Approach Models in the Integrated Criminal Justice System and Theory of Law Enforcement.

II. RESULT AND DISCUSSION

The Nature of the Criminalization of Private Legal Subjects as Perpetrators in Corruption Crimes

The principle of legality requires the existence of definite provisions beforehand regarding prohibited acts and criminal provisions imposed on the perpetrators as well as criminal liability to the corporation and its management as stated by Simons, Van Hamel, Van Hattum that the existence of the principle of legality is useful to ensure legal certainty from the judge's arbitrariness, while Vos revealed that the principle of legality has benefits in addition to the general deterrence of criminal threats as well as guaranteeing legal certainty [8] [9]. A corporation is a legal entity that has rights and obligations and can perform legal actions. Corporate actions that can be regarded as criminal acts have been formulated in several laws and regulations in Indonesia and in facilitating law enforcement agencies to handle corporate crimes, the Attorney General's Office has issued Regulation of the Attorney General of the Republic of Indonesia Number (Perja No): PER-028/AJA/10/2014 dated October 1, 2014 concerning Guidelines for Handling Criminal Cases with Corporate Law Subjects. The Perja regulates the imposition of criminal charges by the Prosecutor on corporate crimes that can be submitted to corporations, corporate management, as well as corporations and corporate management. However, if the law does not regulate the subject of corporate law, then criminal charges are submitted to the management. After the technical instructions were issued by the Prosecutor's Office, the Supreme Court then issued Supreme Court
Regulation No. 13 of 2016. The definition of a corporation in the Perma is contained in Article 1 paragraph (1) which states that a corporation is an organized collection of people and/or wealth, whether it is a legal entity or not a legal entity.

Perma No. 13 of 2016 regulates the procedures for handling corporate criminal cases which are spread in laws and regulations that contain corporations as legal subjects. Corporate crime is a crime committed by a person based on an employment relationship, or other relationship, either individually or collectively acting for and on behalf of the corporation inside and outside the corporate environment. The criminal penalty for corporations in this regulation is only a fine and if the corporation is unable to pay then the authorities have the right to confiscate the assets and then auction them off as compensation for state losses. In relation to the subject of corporate responsibility, it is regulated in Article 23 of Perma No. 13 of 2016. In this case, the legal subjects in corporate liability are (a) the Corporation or the Management; (b) Corporations and Management; (c) Other parties proven to be involved in corporate crimes. Corporations as legal subjects in the Indonesian criminal law system can be distinguished between those who commit a crime (the maker) and those who are responsible, this depends on the criminal liability formulation system that will be used [10]. Article 1 paragraph (8) a criminal act by a corporation is a crime for which a corporation can be held criminally responsible in accordance with the law governing corporations. In the Perma, the judge stated that the corporation had committed a crime that could be punished if:

1. The corporation may obtain profits or benefits from the crime or the crime is committed for the benefit of the corporation;

2. Corporations allow criminal acts to occur;

3. The corporation does not take the necessary steps to prevent, prevent a bigger impact and ensure compliance with applicable legal provisions in order to avoid the occurrence of criminal acts.

Meanwhile, the definition of corporate management is regulated in Article 1 paragraph (10) of Perma No. 13/2016, namely “Managers are corporate organs that run corporations in accordance with the articles of association or laws that are authorized to represent corporations, including those who do not have the authority to make decisions, but in reality can control or influence corporate policies or participate in deciding qualifying corporate policies. as a crime." The article states that both the management who has the authority and the management who does not have the authority can become the legal subject of a corporate crime if in reality the management can control, influence the corporate policy and decide the corporate policy can be qualified as a criminal act. Regarding the management representing the perpetrators of corporate crime or the management representing the corporation being made a suspect in the same case as the management, it is as regulated in Article 15 of Perma No. 13/2016 which states: (1) In the event that a Corporation is proposed as a suspect or defendant in the same case as the Management, the Management representing the Corporation is the Management who is the suspect or defendant. (2) Other administrators who are not suspects or defendants may represent the Corporation in the case as referred to in paragraph (1).

The administrator who represents the researcher is another management who is not a suspect or defendant can represent the corporation in the event that the corporation is proposed as a suspect or defendant in the same case as the management which in Article 15 paragraph (1) if the corporation is proposed as a suspect or defendant in a case. the same as the management, the management representing the corporation is the management who is a suspect or defendant. In this case, the criteria for the accountability of the management who represent the corporation is to use strict liability which excludes the element of error where in criminal law there is the principle of geen straf zonder schuld, namely punishment without error, meaning that no one can be punished if no mistakes have been made. Comparison with countries that adhere to the common law system, strict liability is a crime determined by legislation (statute). The error must meet elements including committing a criminal act, being able to take responsibility, being done intentionally or by negligence and there is no excuse for the perpetrator [11]. The existence of an error not only determines the accountability of the maker but also can be punished by the maker [12].

In an act of corporate management, the responsibility for it must be ensured to fulfill the authority or order to commit a crime with the corporation by wanting to commit an act (mens rea). In the explanation of Article 20 paragraph (1) of Law no. 31/1999 jo. UU no. 20/2001 states that what is meant by management is a corporate
organ that carries out the management of the corporation concerned in accordance with the articles of association, including those who in fact have the authority and participate in deciding corporate policies that can be qualified as criminal acts of corruption. In this case, the management of the corporation is the management who does have the authority to run the corporation. So in this case, authority becomes an important element in accountability.

In terms of corporate responsibility, it is known as the principle of strict liability, which is the doctrine of corporate criminal responsibility adopted from the doctrine of civil law, namely the doctrine applied to unlawful acts. In the event that the corporation violates or does not fulfill certain obligations/conditions/situation by the corporation, this is known as "companies offences", "situational offenses", or "strict liability offenses". For example, the law stipulates as an offense for (a) a corporation that runs its business without a permit; (b) Permit holder corporations that violate the terms (conditions/situations) specified in the permit; (c) Corporations operating uninsured vehicles on public roads [13].

In criminal law, the principle of strict liability is a doctrine that overrides the element of error or the element of mens rea in criminal liability. This doctrine deviates from the main principle in criminal law, namely the principle of mens rea itself, the strict liability provision is an exception to the principle of no crime without error (Geen Straft Zonder Schuld). Meanwhile, according to Vos views the notion of error as (a) the responsible ability of the person who commits the act; (b) Certain mental relations of the person doing the act, whose actions can be in the form of negligence or intentional; (c) There is no reason that removes responsibility for the perpetrator for his actions

The birth of this exception is an extension and deepening of the regulatory, moral principle, namely that in certain cases a person's responsibility is deemed appropriate to be extended to the actions of his subordinates who do work or actions for him or within the limits of his orders. L.B. Curson argues that this doctrine can be applied to the following conditions (a) Ensuring compliance with regulations relating to social welfare is essential; (b) Evidence related to the principle of mens rea is difficult to apply to violations related to social welfare; (c) There is a very dangerous impact due to the actions taken.

With regard to corporate criminal acts, this doctrine can be applied to corporate criminal liability concerning the protection of the public interest or public interest as well as crimes against the environment. The problem here is as in Article 15 of Perma No. 13 of 201626 regulates corporate criminal liability carried out by management using the principle of strict liability. In the provisions of the article there is no clarity on who the management can represent the corporation in a case between the corporation and the management of the perpetrator of a corporate crime. Is the management included in Article 1 number 10 of the Perma, namely the management who has the authority and does not have the authority or the management who does have the authority to control the corporation in the event of a criminal act.

In this article, the mens rea does not need to be proven as stated by Barda Nawawi Arief, namely regarding strict liability which states that a person can be accounted for for certain criminal acts even though it is not necessary to prove the guilt of the defendant (mens rea). In short, strict liability is defined as "liability without fault". However, an error is one element of a person considered capable of being responsible for a criminal act. This will also determine the extent to which the management is responsible for criminal acts committed by a corporation. The relationship between one administrator and another is carried out in the context of a series of work between humans, in casu through a certain organization called a corporation. Therefore, it is reasonable to state that the perpetrators are responsible for the consequences that are considered adequate to arise from the expansion of the scope of their actions. However, it will be difficult to know how far the limit of responsibility lies.

The error here is related to the geen straf zonder schuld principle, namely there is no crime without error which is an exception to the principle of strict liability. Quoting Sudarto's opinion in interpreting mistakes where a person's punishment is not enough if that person has committed an act that is against the law or is against the law. So even though the maker fulfills the formulation of the offense in the law and is not justified, it does not meet the requirements to be sentenced. Related to the meaning of management in Article 1 point 10 of Perma No. 13/2016 there is an expansion of the withdrawal of "management” accountability including those who do not have the authority to make decisions, but in reality can control or influence corporate policies or participate in deciding policies within the corporation. This expansion needs to be a question then what are the limitations in terms of determining an act committed by a person is categorized as a corporate action and is responsible for it if
that person (management) does not have the authority and even does not have the mens rea in Article 15 paragraph (2) in Perma No. 13/2016 he can represent in court.

If it is associated with several theories of corporate criminal responsibility such as identification theory, it is still required that the position and authority of the person concerned is related to the crime committed. Muladi argues that the doctrine of identification of a company can carry out a number of offenses directly through people who are very closely related to the company. Dening L. J. argues that the attitude of the heart of the manager is the attitude of the heart of the company itself. The doctrine of identification is also often referred to as alter ego theory. People who have high positions such as high level managers are considered as the directing mind and will of the corporation so that mens rea is located from the individual who becomes the directing mind of the corporation. This identification doctrine in its application does not touch employees who have positions that are classified as low in a company because in order for the individual's actions to be said to be acts committed by the corporation, the individual must act as a directing mind. This is a limitation in corporate criminal liability which requires actions taken by someone with a high position [15]. How to determine the directing mind is to look at the facts there are cases such as the position of the individual or the authority possessed so that it can be said that the actions of the individual are indeed the actions of the company.

Hulsman stated that elements of error in the form of intentional elements or elements of negligence can be carried out by organs of the corporation or other workers who determine organizational policies [16]. Elements of mistakes made can appear unconsciously in cooperation between workers. In this case it can be interpreted that the event has something to do with the actions of the people who work in that one organ. While Van Bemmelen views that the intentionality of the corporation is the shared knowledge of most members of the board of directors, Jan Remmelink stated that corporate actions are actions that are carried out through individual representatives. Therefore, the element of offense committed by a number of different people. This will make it difficult in terms of proving and applying Article 15 paragraph (2) because it is to determine who the management can represent the boundaries where it is said that other administrators who are not suspects or defendants can represent the Corporation. Here, it must be noted which principle of strict liability and geen straf zonder schuld itself is more suitable to be applied.

Suprapto is of the opinion that corporate mistakes can be taken on the basis of intentional or negligent tools and that such errors are not individual but collective. Corporations can have faults taken from the management or directors who carry out their functional duties. This is because in doing or not doing, the actions carried out by the corporation are actions that are represented by individuals in the corporate organs, namely the management. The principle of error can be imposed on corporate management. The party who is actually being held criminally responsible should be quite actively involved in criminal acts committed by corporations [17]. This is a form of guarantee for human rights (HAM) that must be protected. As Indonesia is also a state of law, so that the state of Indonesia has criteria or characteristics such as the concept of a legal state of Rechtsstaat and the concept of a state of law The Rule Of Law. According to Jimly Asshidiqie, one of the principles of the state as a state of law is the protection of human rights [18].

Therefore, if according to the provisions of the strict liability principle, a person who commits a crime, even though it is not necessary to prove an element of guilt on him, can still be accounted for according to criminal law [19], and the provisions of the geen straf zonder schuld principle which are the exception, the provisions for its use must be limited to cases - certain cases that should be explicitly stated in the legislation so that law enforcement officers do not experience confusion in applying the principle to determine whether the management of a corporation can be responsible or not. Although in Law no. 31 of 1999 jo. UU no. 20 of 2001 concerning the Eradication of Criminal Acts of Corruption, the management can also be represented by other people as stipulated in Article 21 paragraph (4) of the Law on the Eradication of Criminal Acts of Corruption.

Several laws outside the Criminal Code also explicitly formulate corporate boundaries that are wider than those given by legal experts on corporations, a concrete example of this is Article 1 number 21 of Law no. 35/1999, stipulates that the legislative policy whose form is contained in the formulation of corporate boundaries as stated in the examples of provisions in the law clearly has its own fundamental consequences regarding what is meant by "corporation" as a term used in the law, this needs to be emphasized because the understanding in this context is not only different from the understanding built by legal experts as a doctrine, but also different from the corporate understanding in the scope of civil law, where the difference becomes very basic because within the limits provided by law, the law brings the following consequences: 1) corporations are not always legal entities,
but may also not be legal entities; 2) corporations are not always legal subjects, but may also not be legal subjects, so that: a) on the one hand there are corporations that have rights and obligations, but on the other hand there are corporations that do not have rights and obligations; b) on the one hand there are corporations that have the authority to act, but on the other hand there are corporations that do not have the legal authority to act.

The provision of corporate limits as stipulated in dozens of laws outside the Criminal Code has further legal consequences, namely that non-legal entities can be held criminally accountable and may also be subject to criminal sanctions. This is contrary to the "nature" of the non-legal entity which by law is deliberately determined that the non-legal entity is not a legal subject, and therefore it has no legal rights and obligations, does not own assets, and does not have any legal rights or obligations. authority to act, in short he is not a person. In contrast to humans (natuurlijke person) who ipso jure are people, what is equated with humans as persons by law is a legal entity (rechtspersoon), and therefore a legal entity is a person (person) in a legal construction which has the meaning as bearers of rights and obligations: “A corporation is an organized collection of people and/or assets, whether they are legal entities or not”. Furthermore, Article 130 paragraph (1) of Law no. 35/1999 stipulates that: "If the criminal act as referred to in paragraph (1) is committed by a corporation, the penalty is a maximum fine of Rp. 5,000,000,000 (five billion rupiah)". Likewise with Article 1 point 1 of the Corruption Law which stipulates: "A corporation is an organized group of people and/or assets, whether a legal entity or not a legal entity”. Furthermore, Article 20 paragraph (1) stipulates: "In the event that a criminal act of corruption is committed by or on behalf of a corporation, criminal charges and punishments can be made against the corporation and or its management”.

Criminal acts are not only committed by legal entities (rechtspersoon), but also by non-legal entities. Such a view according to the author is wrong, because from the legal point of view "an entity that is not a legal entity (indeed) cannot take any action/deed", so the law considers that the person who carries out the action or deed is the natural person (human). who is the manager or owner of a body that is not a legal entity in question, and therefore his criminal responsibility becomes the burden of the natuurlijke person. This is different when compared to a legal entity (rechtspersoon) which does have the authority to carry out an action/deed, even though materially an action is carried out by a management or even an employee of a legal entity, but the action/deed is seen as an act of a legal entity. (rechtspersoon) concerned, so that criminal liability becomes the burden of the legal entity.

The phenomenon of the expansion of corporate boundaries, there are several legal experts who try to accommodate it by arguing that in accordance with the times, the understanding of corporations is currently developing into 2 (two) kinds, namely the understanding of corporations in a narrow sense and in a broad sense. The definition of a corporation in a narrow sense is a corporation as a legal entity (a corporation is a legal person). Corporations in a narrow sense have the existence of legal authority to act to carry out legal actions. The existence of a corporation as a legal entity does not just appear, meaning it does not exist by itself and does not arise by law. Corporations as legal entities exist because there are those who set them up according to the provisions that have been regulated in applicable civil law, while those who can establish corporations are initially humans (natuurlijke person) and of course can also be legal entities (rechtspersoon). While the definition of a corporation in a broad sense, is a corporation that can take the form of a legal entity or not a legal entity. So it is as if in criminal law it is not only legal entities such as Limited Liability Companies, Foundations, Cooperatives, or associations that have been legalized as legal entities classified as corporations according to civil law, but also Maatschap (Ma.), Firms (Maatschap). Fa.), Limited Partnership (CV), Trading Business (UD) or even a group of people who are organized and have leadership and carry out certain activities are also included in the definition of a corporation.

CONCLUSION

Legislation policies that broaden the notion of "corporation" to describe the corporation as a legal entity on the one hand, and non-legal entities on the other, would be important to be discussed and straightened out so as not to cause a deeper misguidance, both at the law in the ground level. book, especially in legal theory as well as in its application to everyday legal practice, considering that non-legal entities in the context of civil law as the legal field that oversees them have determined that such bodies cannot be held accountable in law, because they are not persons.

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